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# Values in Transition: The Development of the Gay and Lesbian Rights Movement in Hong Kong

CAROLE J. PETERSEN\*

## I. INTRODUCTION

In the early 1980s, when Great Britain and the People's Republic of China (PRC) negotiated the terms for returning Hong Kong to the PRC in 1997,<sup>1</sup> a gay and lesbian rights movement was almost nonexistent in Hong Kong. Male homosexual conduct was a criminal offense punishable by a maximum term of life imprisonment,<sup>2</sup> and the local police maintained a special unit solely responsible for monitoring homosexual activity.<sup>3</sup> The absence of any legal recourse left gays and lesbians vulnerable to discrimination at work, at school, and in the general community. Indeed, it was legal to discriminate on any ground at that time, and employers did so openly.<sup>4</sup> Under this social climate, gays and lesbians maintained an extremely

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1. See Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, Dec. 19, 1984, U.K.-P.R.C., 23 I.L.M. 1371 [hereinafter Joint Declaration].

2. See Offences Against the Person Ordinance, LAWS OF HONG KONG ch. 212 (1981).

3. See THE LAW REFORM COMM'N OF H.K., REPORT ON LAWS GOVERNING HOMOSEXUAL CONDUCT 2 (1983) [hereinafter LAW REFORM COMMISSION REPORT].

4. For a discussion of sex discrimination in Hong Kong and the Sex Discrimination Ordinance, Hong Kong's first anti-discrimination law enacted in 1995, see Carole J. Petersen, *Equality as a Human Right: The Development of Anti-Discrimination Law in Hong Kong*, 34 COLUM. J. TRANSNAT'L L. 335 (1996).

low profile in Hong Kong and were decidedly apolitical. In the words of one commentator, "[t]he homosexual minority is, on the whole, respectable, conformist in most things, and strongly pro-Establishment. Given the state of the law in the Colony, this is perfectly understandable."<sup>5</sup>

In early 1997, only months before the transfer of sovereignty to the PRC, the atmosphere has significantly changed. Hong Kong now has a Bill of Rights that expressly grants individuals a right to privacy.<sup>6</sup> As a result, the legislature has decriminalized most male homosexual conduct,<sup>7</sup> and a small gay and lesbian rights movement has emerged. Hong Kong has also enacted its first anti-discrimination laws: the Sex Discrimination Ordinance<sup>8</sup> and the Disability Discrimination Ordinance.<sup>9</sup> In 1995, the legislature defeated a broader bill prohibiting discrimination on the ground of sexuality;<sup>10</sup> however, a member of the legislature re-introduced the bill in 1996,<sup>11</sup> and it is currently pending. In response to these legislative proposals, the Hong Kong government recently conducted a formal public consultation exercise on the problem of sexuality discrimination.<sup>12</sup>

These changes, which occurred during the thirteen-year transition period leading to Hong Kong's return to the PRC, stem largely from increased public demand for legal protection of human rights, democracy, and equality. This period of liberalization may, however, eventually be remembered only as a brief interval in Hong Kong's history. When the PRC regains sovereignty over Hong Kong, the gay and lesbian rights movement may falter, subjecting its proponents not only to inequality, but also to persecution.

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5. H.J. Lethbridge, *The Quare Fellow: Homosexuality and the Law in Hong Kong*, 6 H.K. L.J. 292, 321-22 (1976).

6. See Hong Kong Bill of Rights Ordinance, LAWS OF HONG KONG ch. 383 (1991).

7. See Crimes Ordinance, LAWS OF HONG KONG ch. 200, §§ 118A-118N (1991).

8. Sex Discrimination Ordinance, LAWS OF HONG KONG ch. 480 (1995).

9. Disability Discrimination Ordinance, LAWS OF HONG KONG ch. 487 (1995).

10. See Equal Opportunities (Family Responsibility, Sexuality and Age) Bill, H.K. GOV'T GAZETTE, June 30, 1995, Legal Supp. No. 3, at C1660.

11. See Equal Opportunities (Family Responsibility, Sexuality and Age) Bill, H.K. GOV'T GAZETTE, June 28, 1996, Legal Supp. No. 3, at C1792.

12. See HONG KONG GOV'T, EQUAL OPPORTUNITIES: A STUDY ON DISCRIMINATION ON THE GROUND OF SEXUAL ORIENTATION—A CONSULTATION PAPER app. III (1996) [hereinafter CONSULTATION PAPER].

Part II of this Article describes the laws against homosexual conduct prior to the transition period and analyzes the reasons that attempts to liberalize the law initially failed. Part III discusses the introduction of the Hong Kong Bill of Rights and demonstrates how it led to the decriminalization of homosexual conduct in 1991. Part IV analyzes the ongoing campaign to enact a law prohibiting discrimination on the ground of sexuality. Part V critiques the recent public consultation exercise on sexuality discrimination. Finally, Part VI briefly considers prospects for the gay and lesbian rights movement after 1997.

## II. HONG KONG'S LAWS AGAINST MALE HOMOSEXUAL CONDUCT

Prior to July 1991, Hong Kong law criminalized virtually all male homosexual conduct. A chapter entitled "Abominable Offenses" in the Offences Against the Person Ordinance<sup>13</sup> contained several provisions aimed at gay men. For example, section 51 provided:

Any male person who, in public or private, commits or is a party to the commission of, or procures or attempts to procure the commission by any male person of any act of gross indecency<sup>14</sup> with another male person shall be guilty of a misdemeanor triable summarily, and shall be liable to imprisonment for two years.<sup>15</sup>

Other provisions did not solely criminalize homosexual behavior. Section 49 provided that "any person who is convicted of the abominable crime of buggery, committed with mankind or with any animal, shall be guilty of a felony and shall be liable to imprisonment for life."<sup>16</sup> Under English and Hong Kong law, the term "buggery" included both homosexual and heterosexual anal intercourse.<sup>17</sup> Openly gay couples, however, were far more vulnerable to

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13. Offences Against the Person Ordinance, LAWS OF HONG KONG ch. 212 (1981). The "abominable offences" have been part of Hong Kong law since 1865 when Hong Kong adopted the English Offences Against the Person Act of 1861.

14. The case law defining the term "gross indecency" is sparse. Sexual contact between the genitals of one man and the body of another is sufficient, but such contact may not always be required to prove the offense. See LAW REFORM COMMISSION REPORT, *supra* note 3, at 58.

15. Offences Against the Person Ordinance, LAWS OF HONG KONG ch. 212, § 51.

16. *Id.* § 49.

17. See *id.*

suspicion and prosecution than heterosexual couples.

Supporters of criminalizing homosexual behavior believed that these laws emerged from the Chinese culture's strong aversion to homosexuality.<sup>18</sup> The actual source of these laws, however, is English law—the origin of most criminal laws in Hong Kong since it became a British colony.<sup>19</sup> English criminal law prohibited all male homosexual conduct<sup>20</sup> until the enactment of the Sexual Offences Act of 1967.<sup>21</sup> The Act decriminalized homosexual acts in private between consenting adults, defined as persons twenty-one years of age or older.<sup>22</sup> In passing the Act, the British Parliament implemented one of the recommendations of the Departmental Committee on Homosexual Offenses and Prostitution, commonly known as the Wolfenden Committee. Ten years earlier, the Wolfenden Committee had recommended the decriminalization of homosexual behavior in private between consenting adults.<sup>23</sup>

Hong Kong's legislature has generally followed England's lead with respect to statutory reform. In the case of the English Sexual Offences Act of 1967, however, there was initially very little call in Hong Kong to follow the English example of decriminalizing homosexual acts. This was partly due to conservative attitudes and a corresponding lack of public discussion of sexual matters. Moreover, in the late 1960s, there were extremely few prosecutions for homosexual offenses, and the police made no real attempt to enforce the law against private consensual homosexual conduct.

In the late 1970s, however, a series of events made Hong Kong significantly more dangerous for gay men. In 1978, a well-known English solicitor pled guilty to charges of buggery and gross indecency involving four fifteen-year old Chinese boys and was sentenced to three years imprisonment.<sup>24</sup> In 1979, while serving his sentence, the solicitor alleged in a petition for clemency that he was

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18. See LAW REFORM COMMISSION REPORT, *supra* note 3, at 129.

19. See *id.* at 54; Michael I. Jackson, *The Criminal Law*, in *THE LAW IN HONG KONG 1969-1989*, at 178-80 (Raymond Wacks ed., 1989).

20. Sexual Offences Act, 1956, 4 & 5 Eliz. 2, ch. 69, §§ 12(1), 13 (Eng.).

21. Sexual Offences Act, 1967, ch. 60, § 1 (Eng.).

22. The Act applied only to England and Wales and did not extend to other British territories, such as Hong Kong. *Id.* § 11(5).

23. See HOME OFFICE, SCOTTISH HOME DEP'T, REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENCES AND PROSTITUTION, 1957, Cmnd. 247, at 115.

24. See LAW REFORM COMMISSION REPORT, *supra* note 3, at 2.

discriminated against and subjected to selective enforcement of the law. He also threatened to name many "high-placed" gay men.<sup>25</sup>

As a result of these allegations and evidence discovered during the course of the solicitor's prosecution, the government established a Special Investigation Unit (SIU) within the Criminal Investigation Department of the Royal Hong Kong Police Force. The SIU was responsible for investigating homosexual activities, particularly male prostitution and the procurement and exploitation of minors.<sup>26</sup> This effort, known as "Operation Rockcorry," led to the arrest of several individuals, several of whom were charged and tried in court.<sup>27</sup>

In a letter to the Commissioner of Police, the Hong Kong Attorney General stated that "the primary target [of Operation Rockcorry] should be those who profit from homosexuality through procuring"<sup>28</sup> and "[t]he second targets should be homosexuals who abuse young boys [eighteen years of age and younger] or other persons under . . . other disability."<sup>29</sup> The Attorney General failed, however, to articulate a policy of *not* prosecuting non-procured homosexual activity between consenting adults. He cautioned against actively *searching* for evidence of such conduct, but stated that the "third targets should be homosexuals against whom credible evidence emerges during other investigations."<sup>30</sup> He also noted that a complaint of homosexual activity from a member of the public could not be ignored, but "must be acted upon in the normal way."<sup>31</sup>

This policy change particularly threatened gay male lawyers or those employed in other jobs related to law enforcement. With respect to these individuals, the Attorney General instructed the Commissioner of Police as follows:

An exception to the above guidance in relation to consenting adults should be made in the case of credible 'leads' against either members of the Judiciary or of the Attorney General's Chambers or of other lawyers in active practice in the Courts or of the Police. Assuming such leads to be credible, then these

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25. See *id.* at 25.

26. See *id.* at 2.

27. See *id.*

28. *Id.* annexure 28 at A214.

29. *Id.* annexure 28 at A214-15.

30. *Id.* annexure 28 at A215.

31. *Id.*

should be followed up, because it is unacceptable to have those charged with the enforcement of the law themselves to be deliberately breaking it.<sup>32</sup>

Thus, even a barrister in private practice was vulnerable to prosecution if the police received a "credible lead" of his homosexual activity.

Fearing a witch hunt, a number of academics, lawyers, and social workers began criticizing the SIU and the laws that it sought to enforce.<sup>33</sup> In mid-1979, 424 individuals petitioned the government to decriminalize homosexual conduct between consenting adults.<sup>34</sup>

The issue received further publicity in January 1980 when John MacLennan, a Scottish Inspector with the Royal Hong Kong Police, mysteriously died. The SIU had investigated MacLennan, and his arrest for "acts of gross indecency" with male prostitutes was imminent. When the police arrived at his home to arrest him, however, they found him dead from five gunshot wounds, all but one in the area of the heart. Although the police found a suicide note, others alleged that MacLennan had been "set up" and then murdered because he possessed a list of government officials and prominent community members who were gay.<sup>35</sup> Consequently, the government appointed Sir Ti Liang Yang, Justice of the Court of Appeal, to conduct an inquiry into the matter.<sup>36</sup> After a 134-day investigation, Sir Yang found that MacLennan had committed suicide because he feared his arrest.<sup>37</sup> Nonetheless, the public debate over the circumstances of MacLennan's death continued for several years.<sup>38</sup>

Amidst this controversy, the government created the Law Reform Commission of Hong Kong (Law Reform Commission). As one of its initial topics for consideration, the Law Reform Commis-

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32. *Id.*

33. See, e.g., *Anti-Homosexuality Laws Blasted as 'Wicked'*, S. CHINA MORNING POST, July 14, 1979; *Is This the Witch-hunt of the Century?*, S. CHINA MORNING POST, Mar. 20, 1980.

34. LAW REFORM COMMISSION REPORT, *supra* note 3, at 2.

35. See T.L. YANG, A SUMMARY OF THE REPORT OF THE COMMISSION OF INQUIRY INTO INSPECTOR MACLENNAN'S CASE 5 (1981).

36. See *id.* at 3-16.

37. See *id.* at 15.

38. See Mariana Wan, *Shots That Changed the Law*, S. CHINA MORNING POST, Jan. 20, 1991, Spectrum, at 5; Shane Green, *MacLennan: Doubt Still Casts a Shadow*, S. CHINA MORNING POST, Jan. 13, 1990, Review, at 1.

sion chose the laws against homosexual acts.<sup>39</sup> The Law Reform Commission created an eight-member subcommittee headed by Sir Yang. The subcommittee's "terms of reference" included: medical views of homosexuality; laws on homosexual conduct in other countries, particularly those with a Chinese population; incidences of homosexual offenses and "exploitation" of homosexuality, such as blackmail; and means of obtaining the views of the general public and interested parties, including ways in which gay men could safely give evidence to the Law Reform Commission.<sup>40</sup>

The subcommittee solicited the views of the public at large, numerous organizations, and members of the District Boards, arguably the only representative bodies in the Hong Kong government at that time.<sup>41</sup> The District Boards predominantly disfavored amending the laws because decriminalization "would offend the moral sense of the majority of the Chinese population of Hong Kong[,] . . . would imply that the government encourages such activities[,] . . . might have an] undesirable . . . effect on the younger generation[,] and might lead to family disorganization and social disintegration."<sup>42</sup> Public opinion polls indicated that these views were representative of the Hong Kong Chinese. For example, in one survey, seventy percent of Chinese respondents supported the maintenance of homosexual offenses, and most respondents cited "Chinese morals" as their reason.<sup>43</sup>

Nonetheless, in 1983, after a three-year investigation, the Law Reform Commission published a lengthy report recommending decriminalization of homosexual acts between consenting adults. The Law Reform Commission based its recommendations on its findings as follows: there are no "victims" of private consensual sex between two adult men; the law should not unnecessarily interfere in private lives; anti-homosexuality laws are difficult to enforce and unlikely to deter homosexual conduct; and such laws caused gay men substantial anxiety because they made gay men vulnerable to blackmail and

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39. See LAW REFORM COMMISSION REPORT, *supra* note 3, at 3.

40. See *id.* annexure 1(II) at A3.

41. See *id.*

42. *Id.* annexure 11(II) at A115.

43. See COMMERCIAL RADIO OPINION SURVEY SERV., PUBLIC OPINION SURVEY (1980), reprinted in LAW REFORM COMMISSION REPORT, *supra* note 3, annexure 21 at A179, A185.



other forms of abuse and exploitation.<sup>44</sup>

The Law Reform Commission acknowledged that decriminalizing homosexual acts without public acceptance might be viewed as the "imposition of an alien concept by an expatriate government on Chinese people;"<sup>45</sup> however, the Law Reform Commission rejected this argument, reasoning that much of the public's views appeared to be based upon "a lack of knowledge of the true facts."<sup>46</sup> In particular, the Law Reform Commission cited the inaccuracy of the view that homosexuality is a Western disease "alien" to Hong Kong and noted that homosexuality has always existed in Chinese societies "in equal measure" to other races.<sup>47</sup>

Despite these arguments, public opinion prevailed, and the Hong Kong government chose not to implement the Law Reform Commission's recommendations. At the time, neither the government nor the legislature were formally accountable to the Hong Kong people because the British government appointed the Governor and the Legislative Council consisted entirely of government officials and other appointed members. Nonetheless, the colonial government was unwilling to defy public opinion on such a sensitive issue.

### III. THE HONG KONG BILL OF RIGHTS AND DECRIMINALIZATION OF HOMOSEXUAL CONDUCT

Approximately two years after the publication of the Law Reform Commission's report on homosexual offenses, Hong Kong entered a new era. In May 1985, Great Britain and the PRC ratified the Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong (Joint Declaration),<sup>48</sup> agreeing that Great Britain would return Hong Kong to the PRC in 1997.<sup>49</sup> The Joint Declaration created great concern in Hong Kong because most people would have preferred that Hong

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44. *See id.* at 120-22, 128-37.

45. *Id.* at 130.

46. *Id.*

47. *Id.*

48. Joint Declaration, *supra* note 1.

49. *See id.* paras. 1-2, at 1371.

Kong remain a British-dependent territory.<sup>50</sup>

In order to allay people's concerns about Hong Kong's return to the PRC, the Joint Declaration promised that the Special Administrative Region of Hong Kong would enjoy a "high degree of autonomy" from the PRC's national government<sup>51</sup> and would retain, for at least fifty years, the same legal and economic systems, rights and freedoms, and basic way of life that existed prior to 1997.<sup>52</sup> The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Basic Law),<sup>53</sup> which will serve as Hong Kong's quasi-constitution after 1997, repeats these statements.<sup>54</sup>

Nonetheless, many people in Hong Kong feared that the PRC would not adhere to the Joint Declaration and Basic Law. Moreover, people expected that even Hong Kong's existing legal system would be subject to abuse after 1997 because it gave the Hong Kong government enormous powers.<sup>55</sup> In the summer of 1989, when one million Hong Kong residents marched to protest the massacre in Beijing's Tiananmen Square, public confidence in the future of Hong Kong sank "to an all-time low."<sup>56</sup>

In an attempt to rebuild confidence, the Hong Kong government announced the introduction of domestic human rights legislation. A draft of the bill was released for public consultation in March 1990, and the Bill of Rights Bill was formally introduced into the Legislative Council in July 1990. After further public consultation and amendments, the Bill of Rights was enacted in July 1991.<sup>57</sup>

In drafting the Bill of Rights, the Hong Kong government used

50. A 1982 survey reported that 70% of respondents preferred that Hong Kong maintain the status quo and an additional 15% preferred that Hong Kong become a British "trust territory." See JOSEPH Y.S. CHENG, *HONG KONG IN SEARCH OF A FUTURE* 85 (1984). Only 4% preferred that Hong Kong be returned to China. See *id.*

51. See Joint Declaration, *supra* note 1, para. 3(2), at 1371.

52. See *id.* para. 3(5), at 1372.

53. Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (1990), reprinted in 29 I.L.M. 1519 (1990) [hereinafter Basic Law].

54. See *id.* arts. 2, 4-5, reprinted in 29 I.L.M. 1519, 1521 (1990).

55. For a discussion of controls on freedom of expression and assembly under Hong Kong colonial law, see Yash Ghai, *Freedom of Expression*, in *HUMAN RIGHTS IN HONG KONG* 369 (Raymond Wacks ed., 1992); Roda Mushkat, *Peaceful Assembly*, in *HUMAN RIGHTS IN HONG KONG*, *supra*, at 410.

56. NORMAN MINERS, *THE GOVERNMENT AND POLITICS OF HONG KONG* 27 (5th ed., 1991).

57. Hong Kong Bill of Rights Ordinance, *LAWS OF HONG KONG* ch. 383 (1991).

as its model the International Covenant on Civil and Political Rights (ICCPR),<sup>58</sup> which had applied to Hong Kong since May 20, 1976, the date of the United Kingdom's ratification of the ICCPR.<sup>59</sup> The main reason for relying on the ICCPR was the Chinese government's agreement that "the provisions of the [ICCPR] . . . shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region."<sup>60</sup> The Hong Kong government hoped that China would have difficulty objecting to a Bill of Rights that essentially repeated agreed-upon rights.

A major issue during the consultation on the draft Bill of Rights was the extent to which the Bill of Rights could preempt existing law. Section 3 addressed this issue in providing: "(1) All pre-existing legislation that admits of a construction consistent with this Ordinance shall be given such a construction. (2) All pre-existing legislation that does not admit of a construction consistent with this Ordinance is, to the extent of the inconsistency, repealed."<sup>61</sup> Thus, section 3 obligated courts to interpret preexisting legislation in a manner consistent with the Bill of Rights, and if this proved impossible, to declare the offending provision invalid.<sup>62</sup>

Making subsequent legislation subject to the Bill of Rights, however, was more difficult. Under the Colonial Laws Validity Act of 1865,<sup>63</sup> a British Parliament act that applies to Hong Kong, only a representative colonial legislature has the power to enact a law that affects its own constitution.<sup>64</sup> As the Hong Kong law-making bodies

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58. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

59. *See id.*

60. Basic Law, *supra* note 53, art. 39, *reprinted in* 29 I.L.M. 1519, 1526 (1990). This language appeared in article 38 of the April 1988 draft and article 39 of the February 1989 draft. *See THE HONG KONG BASIC LAW: BLUEPRINT FOR "STABILITY AND PROSPERITY" UNDER CHINESE SOVEREIGNTY?* 73, 150, 176 (Ming K. Chan & David J. Clark eds., 1991).

61. Hong Kong Bill of Rights Ordinance, LAWS OF HONG KONG ch. 383, § 3.

62. As a result of the Court of Appeal's decision in *Tam Hing-ye v. Wu Tai-wai*, [1992] 1 H.K.L.R. 185 (Ct. App.), however, the Bill of Rights does not affect legislation concerning disputes between private parties. For a criticism of this decision, see Andrew Byrnes & Johannes Chan, Editorial, *The Court of Appeal's Decision in Tam Hing-ye v. Wu Tai-wai*, BILL RTS. BULL., Dec. 1991, at 1-4.

63. Colonial Laws Validity Act, 1865, 28 & 29 Vict., ch. 63 (Eng.).

64. *See id.* § 5.

clearly were not representative,<sup>65</sup> they could not restrict their own powers by enacting a Bill of Rights that purported to be superior to *future* legislation. Ultimately, the British government amended the Letters Patent—Hong Kong's colonial constitution that empowers the Hong Kong legislature until July 1, 1997—to provide: "No law of Hong Kong shall be made...that restricts the rights and freedoms enjoyed in Hong Kong in a manner that is inconsistent with [the ICCPR]."<sup>66</sup> By referring to the ICCPR rather than the Bill of Rights, the British and Hong Kong governments hoped to provide a certain continuity beyond 1997.

Thus, for the first time, people in Hong Kong were given the right to challenge laws that violated their basic human rights. For gay men, the most significant right at that time was the right to privacy, which article 14 expressly protected: "(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. (2) Everyone has the right to the protection of the law against such interference or attacks."<sup>67</sup> This language is identical to article 17 of the ICCPR.<sup>68</sup>

If a Hong Kong court had been called upon to interpret the language in a challenge to the laws against homosexual conduct, the court would have sought guidance from international decisions interpreting similar provisions.<sup>69</sup> When the Bill of Rights was pro-

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65. Under the Letters Patent, the colonial Constitution of Hong Kong, the legislature is the "Governor, by and with the advice and consent of the Legislative Council." HONG KONG LETTERS PATENT 1917 TO 1993 art. VII(1). The British government appoints the Governor, and in July 1991, the Legislative Council was constituted as follows: 11 appointed "officials" (officers in the government), 20 appointed non-governmental members, 14 members elected by "functional constituencies" (elitist business and professional groups), and 12 indirectly elected members. See MINERS, *supra* note 56, at 116 tbl. 5.

66. HONG KONG LETTERS PATENT 1917 TO 1993 art. VII(5). This amendment entered into force on June 8, 1991—the same day that the Bill of Rights Ordinance entered into force. See HONG KONG GOV'T, AN INTRODUCTION TO HONG KONG BILL OF RIGHTS ORDINANCE 2 (1995).

67. Hong Kong Bill of Rights Ordinance, LAWS OF HONG KONG ch. 383, art. 14 (1991).

68. Compare *id.* with ICCPR, *supra* note 58, art. 17.

69. See *R v. Sin Yau Ming*, [1992] 1 H.K.P.L.R. 88, 107-08 (Ct. App.) (stating that it is proper for courts interpreting the Bill of Rights to derive guidance from decisions in common law jurisdictions with constitutionally entrenched bills of rights and from decisions of the European Court of Human Rights, the European Human Rights Commission, and the United Nations Human Rights Committee).

posed, the leading international decision regarding the right to privacy and homosexual offenses was the 1982 *Dudgeon Case*,<sup>70</sup> in which the European Court of Human Rights held that Northern Ireland's laws breached article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECPHRFF)<sup>71</sup> for consenting males over 21 years of age.<sup>72</sup> Article 8 of the ECPHRFF is similar, though not identical, to article 14 of the Hong Kong Bill of Rights. It provides:

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by public authority with the exercise on this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.<sup>73</sup>

The *Dudgeon Case* would have been particularly relevant to Hong Kong because Northern Ireland's law against homosexual conduct was almost identical to Hong Kong's law, having also been derived from English law prior to the Sexual Offences Act of 1967.<sup>74</sup> Moreover, attempts to reform Northern Ireland's law failed for many of the same reasons that efforts to reform Hong Kong's law failed—public opposition and the desire to appear sensitive to local opinion.<sup>75</sup> In 1972, the Northern Ireland Parliament was prorogued, and the country was subjected to "direct rule" from Westminster.<sup>76</sup> The United Kingdom argued in the *Dudgeon Case* that the imposition of direct rule meant that it had a special responsibility to take full account of the wishes of the Northern Ireland people before decriminalizing homosexual acts.<sup>77</sup>

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70. *Dudgeon v. United Kingdom*, 40 EUR. CT. H.R. (ser. B) (1982).

71. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECPHRFF].

72. See *Dudgeon*, 40 EUR. CT. H.R. (ser. B) at 41.

73. ECPHRFF, *supra* note 71, art. 8, at 229.

74. See *Dudgeon*, 40 EUR. CT. H.R. (ser. B) at 15-16.

75. See *id.* at 17-21.

76. See *id.* at 17.

77. See *id.* at 28.

The European Court of Human Rights noted these arguments, but ultimately held that the United Kingdom failed to justify its interference with Dudgeon's private life. The court relied in part on the fact that, in recent years, the authorities had generally refrained from applying the laws to homosexual acts in private between consenting adults. Yet, there was no evidence adduced to show that this refrain had been injurious to moral standards in Northern Ireland.<sup>78</sup> Ultimately, the court held that there was a breach of article 8 of the ECPHRFF.<sup>79</sup>

If gay men had ever used the Bill of Rights to challenge Hong Kong's laws against homosexual conduct, the *Dudgeon Case* would have provided strong persuasive authority. Fortunately, the Hong Kong government recognized this fact, took a proactive approach, and used the Bill of Rights to successfully amend the laws and decriminalize homosexual conduct; thus, no such challenge was required.

Hong Kong achieved decriminalization in two stages. First, in the summer of 1990 after the proposal of the Bill of Rights, but prior to its enactment, the Legislative Council debated the question of decriminalizing homosexual conduct between consenting adults. The government had not yet drafted an amendment to the law because it wanted to first ascertain the extent of legislative support. Several members of the Legislative Council opposed the debate, preferring to allow the courts to resolve the issue of decriminalization after the enactment of the Bill of Rights. Nonetheless, the government persisted, and the Legislative Council held a debate on July 11, 1990.<sup>80</sup>

The Chief Secretary, the next highest government official to the Governor, began the debate with a strongly worded speech in favor of decriminalization. He cited the Law Reform Commission's arguments and claimed that the laws against homosexual conduct would soon "be open to challenge under the [proposed] Bill of Rights."<sup>81</sup> In further support of decriminalization, the Attorney General argued that the laws conflicted with the ICCPR: "It hardly needs saying that the laws of Hong Kong are required, in accor-

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78. See *id.* at 40.

79. See *id.* at 41.

80. See OFFICIAL REPORT OF PROCEEDINGS, HONG KONG LEGISLATIVE COUNCIL 1949 (July 11, 1990).

81. *Id.* at 1969.

dance with our international obligations, to be consistent with those obligations."<sup>82</sup> The government solidified the Bill of Rights argument with its threat to *intensify* its enforcement of the laws if they were not reformed. The Chief Secretary borrowed the words of an eminent French statesman Jean Baptiste Co Hert in stating:

"If you enact a law and do not enforce it, you are condoning what you condemn." A vote against the motion before this Council will be a vote against condoning and in favour of enforcement. And henceforth the Government would be obliged to seek out and prosecute all, both high and low, who infringe against this law, despite all the problems I have mentioned.<sup>83</sup>

If the government had followed through on this threat, it would have instigated a "witch hunt" far worse than Operation Rockcorry, embarrassed the Legislative Council, and invited a challenge under article 14 of the Bill of Rights. Thus, the government made it extremely difficult for the Legislative Council to vote against its motion.

Twenty-three members of the Legislative Council also spoke on the motion. Some members were willing to support decriminalization on the merits. Others disapproved of homosexual conduct, but felt obligated to support the motion in view of the Bill of Rights' imminent enactment. These members explained their vote for decriminalization as a necessary consequence of the strong public support for the Bill of Rights.

Inevitably, the motion passed by a comfortable margin of thirty-one to thirteen with six abstentions. The government viewed this vote as its mandate and proceeded to draft the Crimes (Amendment) Bill.<sup>84</sup> The Bill decriminalized male homosexual conduct in private between two consenting adults, defined as persons twenty-one years of age or older.<sup>85</sup> It was enacted in July 1991,

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82. *Id.* at 1971.

83. *Id.* at 1966.

84. Crimes (Amendment) Bill (1991), H.K. GOV'T GAZETTE, Mar. 22, 1991, Legal Supp. No. 3, at C215.

85. Section 26 repealed sections 49 through 53 of the Offences Against the Person Ordinance. *See id.* § 26, H.K. GOV'T GAZETTE, Mar. 22, 1991, Legal Supp. No. 3, at C228. Section 3 added various offenses to the Crimes Ordinance, such as nonconsensual buggery, homosexual buggery by or with a man under the age of 21, and "non-private" homosexual conduct, which included homosexual conduct by more than two participants. *See id.* § 3, H.K. GOV'T GAZETTE, Mar. 22, 1991, Legal Supp. No. 3, at C218-C221. The

shortly after the Bill of Rights.<sup>86</sup>

#### IV. THE CAMPAIGN FOR LEGISLATION PROHIBITING SEXUALITY DISCRIMINATION

Decriminalization certainly made Hong Kong a safer place for gay men, but it did little to address the problem of discrimination. Most gay men and lesbians still found it necessary to conceal their sexuality because those who "came out" risked employment terminations, apartment evictions, and general avoidance by the community.

The Hong Kong government's failure to legislate against discrimination was not simply due to a lack of sympathy for gays and lesbians. The government had long opposed *any* legislation proscribing discrimination and maintained many laws and policies that blatantly discriminated against women.<sup>87</sup> In the absence of any legal sanctions, Hong Kong employers openly discriminated on the grounds of sex, age, and race. Job advertisements, such as "male engineer" or "female European receptionist under [thirty years of age]," appeared regularly in the newspapers.<sup>88</sup>

The women's movement had unsuccessfully lobbied for legislation prohibiting sex discrimination for many years. When the Bill of Rights was first proposed, women actively participated in the consultation process, hoping to use it as a weapon against discrimination. In fact, although the Bill of Rights proclaims the right to equality, it actually has had little direct impact upon the equality movement.<sup>89</sup> Nonetheless, the Bill of Rights consultation process allowed women to educate legislators and the public about the extent of sex discrimination in Hong Kong. The Bill of Rights also increased the credibility of the women's movement as equality at least became recognized as a protected right.

In preparation for 1997, Hong Kong changed the composition

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current law, which continues to regulate homosexual conduct more strictly than heterosexual conduct, can be found in the Crimes Ordinance, LAWS OF HONG KONG ch. 200, §§ 118A-118N (1991).

86. Crimes (Amendment) Ordinance, Ord. No. 90 (1991), H.K. GOV'T GAZETTE, July 12, 1991, Legal Supp. No. 1, at A573.

87. See Petersen, *supra* note 4, at 339-46 (emphasis added).

88. See *id.* at 347-48.

89. See *id.* at 356-59 (giving reasons why the Bill of Rights failed to have a greater impact on the equality movement).



and role of the Legislative Council. These changes were very significant developments for the equality movement. In September 1991, Hong Kong held its first direct elections for eighteen Legislative Council seats. Women's organizations formed a coalition that asked candidates to declare their positions on discrimination. As a result, many legislators revealed their support for women's rights and criticized the government's failure to legislate against discrimination.<sup>90</sup>

The equality movement also found a few allies among appointed members of the Legislative Council. When Chris Patten became Governor, he made several "liberal" appointments to the Legislative Council. Two of the appointees, Anna Wu and Christine Loh, became strong advocates for equality rights. Devoted to achieving equality, Wu's primary legislative goal was to introduce a comprehensive anti-discrimination bill. She drafted two bills: (1) the Equal Opportunities Bill<sup>91</sup> and (2) the Human Rights and Equal Opportunities Commission Bill (Commission Bill).<sup>92</sup> The Equal Opportunities Bill prohibited discrimination on various grounds, including sex, marital status, pregnancy, family responsibility, disability, sexuality, race, age, political and religious conviction, and "spent conviction."<sup>93</sup> The Equal Opportunities Bill proscribed such discrimination in employment, education, housing, and the administration of laws and government programs.<sup>94</sup> The Commission Bill created an independent public body to promote and enforce the Equal Opportunities Bill and other internationally recognized hu-

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90. For example, in December 1992, the Legislative Council directly contradicted government policy by voting unanimously in favor of a motion urging the Hong Kong government to request the British government to extend the United Nations Covenant on the Elimination of All Forms of Discrimination Against Women (CEDAW), adopted 1249 U.N.T.S. 13, to Hong Kong. Emily Lau, a directly elected legislator who had pledged to support women's rights, proposed the motion debate. For a discussion of the motion debate, see Petetsen, *supra* note 4, at 363-66.

91. Equal Opportunities Bill (1994), H.K. GOV'T GAZETTE, July 1, 1994, Legal Supp. No. 3, at C991.

92. Draft Human Rights and Equal Opportunities Commission Bill (1994), *reprinted in HONG KONG BILL OF RIGHTS: 1991-1994 AND BEYOND* 85 (George Edwards & Andrew Byrnes eds., 1995).

93. Equal Opportunities Bill §§ 10-205 (1994), H.K. GOV'T GAZETTE, July 1, 1994, Legal Supp. No. 3, at C1026-C1218.

94. *See id.*

man rights.<sup>95</sup>

By personally drafting these bills, Wu made history. In the Hong Kong legal system, the government usually proposes and drafts bills, and the Legislative Council studies and votes on them and proposes amendments. Although the Legislative Council's Standing Orders permit the introduction of "private members' bills," this provision had only been used for bills to regulate the affairs of a charity or other private institution.<sup>96</sup> In 1991, Martin Lee became the first non-governmental member to introduce to the Legislative Council a short public bill to amend the Electoral Provisions Ordinance.<sup>97</sup> Wu's Equal Opportunities Bill, however, was the "first private member's bill covering an entire area of law."<sup>98</sup>

In addition to other obstacles, Wu faced an important constitutional constraint. A Legislative Council member must obtain the Governor's express permission before introducing any bill "the object or effect of which may be to dispose of or charge any part of Our revenue arising within the colony."<sup>99</sup> Wu's Commission Bill necessarily required the expenditure of funds for the creation of a new public body. Ultimately, the Governor exercised his constitutional power to prevent Wu from introducing the Commission Bill into the Legislative Council.<sup>100</sup> Wu prevented the Governor from blocking the Equal Opportunities Bill, however, by making it separate and enforceable through existing courts.

Wu used Australian legislation as her model for the Equal Opportunities Bill. She chose Australian law over English law, which is often followed in Hong Kong, because Australian law is more recent and prohibits more types of discrimination. During the drafting process, Wu met with numerous organizations, including women's organizations, gay rights groups, and disability rights groups, in order to make the proposed legislation suitable for Hong Kong. When

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95. Draft Human Rights and Equal Opportunities Commission Bill §§ 62-101 (1994), reprinted in *HONG KONG BILL OF RIGHTS: 1991-1994 AND BEYOND* 123-34 (George Edwards & Andrew Byrnes eds., 1995).

96. See MINERS, *supra* note 56, at 121.

97. See KATHLEEN CHEEK-MILBY, *A LEGISLATURE COMES OF AGE: HONG KONG'S SEARCH FOR INFLUENCE AND IDENTITY* 243 (1995).

98. *Id.*

99. HONG KONG ROYAL INSTRUCTIONS 1917 TO 1993 cl. XXIV, ¶ 2(c).

100. See *Exco Rejects Wu's Rights Commission*, E. EXPRESS (Hong Kong), June 22, 1994, at 1.

she completed drafting the Equal Opportunities Bill in March 1994, Wu conducted a formal public consultation. She subsequently introduced the bill into the Legislative Council in July 1994. A Bills Committee was formed in August 1994 to study the bill and met regularly for most of the 1994-1995 legislative session.<sup>101</sup>

The Bills Committee's task became more complicated in October 1994 when the government suddenly introduced its own bill prohibiting sex discrimination<sup>102</sup> and announced that it would also soon introduce a bill prohibiting disability discrimination. Fear of the actual enactment of Wu's comprehensive bill motivated the government's complete reversal of its opposition to anti-discrimination legislation. Another impetus for the government's decision was the clear demonstration of support for legislation prohibiting sex discrimination in the *Green Paper* public consultation exercise<sup>103</sup> that resulted from a Legislative Council motion debate. Disability rights activists had also recently gained a great deal of public sympathy as a result of several well-publicized incidents of severe discrimination against the mentally disabled. In light of this public support for anti-discrimination legislation and Wu's pending Equal Opportunities Bill, the government realized that its opposition to all discrimination legislation was no longer tenable. Although it adamantly opposed Wu's broader bill, the government hoped to "hold the line" by offering legislation concerning the two groups with the most public support—women and the disabled. The government argued that Wu's bill was too radical and that a slow "step-by-step" approach was more appropriate.

The government's strategy for dealing with discrimination sharply contrasted with Wu's. Wu was committed to *comprehensive* legislation and did not consider leaving out from her bill any area of discrimination that might be too controversial. She believed that the principle of "equality" created a duty to legislate protection for *all*

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101. The Bills Committee held a total of 34 meetings, met with 34 delegations, and received numerous written submissions. See DRAFT PROCEEDINGS, HONG KONG LEGISLATIVE COUNCIL 317 (July 28, 1995) (address of Dr. Leong Che-hung, Chairman of Bills Committee to Study the Equal Opportunities Bill) [hereinafter Leong Address].

102. See Sex Discrimination Bill (1994), H.K. GOV'T GAZETTE, Oct. 14, 1994, Legal Supp. No. 3, at C1382.

103. HONG KONG GOV'T, GREEN PAPER ON EQUAL OPPORTUNITIES FOR WOMEN AND MEN (1993). The Government offered to issue the *Green Paper* in order to delay a response to the Legislative Council's call for the ratification of CEDAW.

victims of discrimination, not only for those with sufficient political power to demand protection.

The government's Sex Discrimination Bill,<sup>104</sup> modeled after Great Britain's Sex Discrimination Act, was weaker than the corresponding provisions of Wu's Equal Opportunities Bill because it provided for delayed enforcement and contained many exemptions. Nevertheless, the Sex Discrimination Bill had one significant advantage over Wu's bill: it created an Equal Opportunities Commission. Wu had previously also legislated for a commission, but the government rejected her Commission Bill. Although the government's proposed commission would not address general human rights concerns, it would assist in conciliating complaints brought under the Sex Discrimination Bill, conduct research into sex discrimination, and promote equality.<sup>105</sup>

Recognizing the strong appeal of an Equal Opportunities Commission, Wu allowed the Legislative Council to vote on the government's Sex Discrimination Bill first. She then concentrated on amending the government's bill to remove many of the exemptions and expand the functions of the Equal Opportunities Commission.<sup>106</sup> In private negotiations, Wu persuaded the government to accept some of her amendments.<sup>107</sup> The Bills Committee endorsed her other amendments, and the Democratic Party, which held the majority of the directly elected seats, supported them; however, the government vigorously lobbied legislators, particularly the appointed members and the conservative representatives of "functional constituencies," to vote against the amendments.<sup>108</sup> Ultimately, the Legislative Council voted in favor of only three of Wu's amendments.<sup>109</sup>

The defeat of the majority of Wu's contentious amendments did not bode well for the remaining provisions of her Equal Opportunities Bill, which came up for a vote one month later. Once again,

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104. Sex Discrimination Bill (1994), H.K. GOV'T GAZETTE, Oct. 14, 1994, Legal Supp. No. 3, at C1382.

105. See *id.* §§ 56-57, 62-65, 76, H.K. GOV'T GAZETTE, Oct. 14, 1994, Legal Supp. No. 3, at C1456-60, C1468-72, C1486.

106. See Petersen, *supra* note 4, at 380-81.

107. See *id.* at 381.

108. See *id.* at 382-83.

109. See *id.*

the government lobbied hard against the bill. The government sent friendly legislators a confidential letter raising numerous "questions" concerning the potential impact of her bill. Several questions focused on the provisions prohibiting sexuality discrimination and clearly appealed to homophobic fears.

In an effort to counter the government's lobbying, Wu offered to make several last minute amendments to the Equal Opportunities Bill.<sup>110</sup> She also divided her bill into three separate pieces of legislation. The first bill covered discrimination on the grounds of age, family status, and sexuality.<sup>111</sup> She believed that this bill had the best chance of passing because there had been many public complaints of discrimination in these areas. The second bill covered race discrimination,<sup>112</sup> and the third bill covered discrimination based on religious and political conviction, trade union membership, and spent conviction.<sup>113</sup>

Although Wu's bills did not have a great chance of being enacted at this point, they sufficiently worried the government into making one further concession. It promised to conduct, early in the next legislative term, formal public consultation on the areas of discrimination that Wu's first restructured bill covered: age, family responsibility, and sexuality.

Although the Democratic Party and the majority of the Bills Committee members supported Wu, the Legislative Council ultimately defeated all three of her bills. Legislators who voted against Wu's bills claimed that they endorsed the value of equality, but would not vote for a comprehensive bill until Hong Kong had more experience with anti-discrimination legislation. The legislature thus embraced the government's "step-by-step" approach to discrimination.

The campaign for legislation prohibiting sexuality and other discrimination is by no means over. The Legislative Council that defeated Wu's Equal Opportunities Bill contained four "official"

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110. See Leong Address, *supra* note 101, at 320.

111. Equal Opportunities (Family Responsibility, Sexuality and Age) Bill, H.K. GOV'T GAZETTE, June 30, 1995, Legal Supp. No. 3, at C1660.

112. Equal Opportunities (Race) Bill, H.K. GOV'T GAZETTE, June 30, 1995, Legal Supp. No. 3, at C1770.

113. Equal Opportunities (Religious or Political Conviction, Trade Union Activities and Spent Conviction) Bill, H.K. GOV'T GAZETTE, June 30, 1995, Legal Supp. No. 3, at C1834.

members, who were guaranteed to vote with the government, and eighteen appointed members, the majority of whom were loyal to the government and tended to vote conservatively.<sup>114</sup> In accordance with the plan to gradually increase democracy in Hong Kong, however, all members of the existing Legislative Council were elected in September 1995 in either direct elections or from functional constituencies, which have now been widened to include all working people in Hong Kong. Thus, the government has lost its "official" votes and the votes of a number of loyal appointed members.

Although Wu chose not to run for re-election in September 1995 and decided instead to return to the full-time practice of law, she has been appointed to the newly created Equal Opportunities Commission and is still active in the campaign for equality rights. Moreover, several legislators are pursuing her proposals. On June 28, 1996, as a result of these efforts, the Equal Opportunities Bill concerning family responsibility, sexuality, and age was formally introduced into the legislature.<sup>115</sup> Presently, the bill awaits assignment to a Bills Committee. If the bill is assigned reasonably quickly, it should be voted on during this legislative session. Otherwise, the bill is likely to die because the PRC has announced that it will dissolve the Legislative Council in July 1997 and replace it with an appointed "provisional" legislature.

Assuming that the bill comes up for a vote, the age and family status provisions have a very good chance of enactment. Despite strong opposition from the business community and the government to legislation prohibiting age discrimination, there is a great deal of public support for it.<sup>116</sup> Many women complain that age discrimination is a more serious problem than sex discrimination because even traditionally "female" jobs are no longer available to women when they reach thirty-five or forty years of age.<sup>117</sup> Furthermore, the government now supports the noncontroversial legislation prohibiting family status discrimination. Thus, the real battle will focus on the question of sexuality discrimination. Unfortunately, the recent pub-

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114. See Petersen, *supra* note 4, at 362 n.83.

115. Equal Opportunities (Family Responsibility, Sexuality and Age) Bill, H.K. GOV'T GAZETTE, June 28, 1996, Legal Supp. No. 3, at C1792.

116. See Petersen, *supra* note 4, at 348 & n.37.

117. See *id.* at 348 & n.38.

lic consultation exercise on the issue suggests the difficulty of enacting such legislation.

#### V. THE PUBLIC CONSULTATION EXERCISE ON SEXUALITY DISCRIMINATION

Following the defeat of Wu's Equal Opportunities Bills, many organizations pressured the government to fulfill its promise to formally consult the public on age, family status, and sexuality discrimination. The government chose to first consult the public on the issue of sexuality discrimination. Knowing that gays and lesbians had less public sympathy than victims of age or family status discrimination, the government counted on the results of the consultation exercise to provide support for its "step-by-step" approach to anti-discrimination legislation.

The government conducted the consultation exercise in a manner that seemed designed to solicit a negative public response. Before releasing the formal Consultation Paper, it commissioned a telephone survey on public attitudes toward homosexuality.<sup>118</sup> Many of the questions were leading and potentially prompted respondents to express more prejudice than they actually held. For example, the survey asked whether respondents would "go swimming with" homosexuals or bisexuals.<sup>119</sup> The average Hong Kong person probably had never given any thought to whether the people who swim at her favorite beach or pool are gay or straight. For an uninformed respondent, the question suggested a danger in swimming with homosexuals. The telephone survey also asked whether respondents would patronize a hotel that admitted homosexuals and whether respondents thought that it was "acceptable" for a homosexual or bisexual to teach in a primary or secondary school or to occupy an important public service position.<sup>120</sup>

The government included the results of this survey as an appendix to the formal Consultation Paper and regularly referred to it in the main body of the paper. For example, the Consultation Paper stated that "public acceptance of homosexuality and bisexuality is

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118. A copy of the telephone survey and its results have been published in the government's consultation paper on sexuality. CONSULTATION PAPER, *supra* note 12, app. III.

119. See *id.* app. III at app. III at 4.

120. See *id.* app. III at app. III at 5-6.

on the low side”<sup>121</sup> and that the public had strong “reservations about interacting with homosexuals/bisexuals” in situations of significant personal contact, such as subletting a room or hiring a domestic helper.<sup>122</sup> The government acknowledged, however, that the majority of respondents did not object to working or studying with gays and lesbians.<sup>123</sup> More importantly, the Consultation Paper reported that most people did not think that legislation prohibiting sexuality discrimination would be effective.<sup>124</sup> Although the Consultation Paper was intended to “consult” the public on the question of legislation prohibiting sexuality discrimination, it essentially answered the question in advance by informing the public that the “average” Hong Kong person did not accept homosexuals and did not favor anti-discrimination legislation.

The government also used the Consultation Paper to repeat several blatantly homophobic statements. The Consultation Paper stated, for example, that certain unnamed “[r]epresentatives of some educational bodies . . . expressed concern that the promiscuous behaviour of homosexuals may have an adverse effect on the overall moral standards of society.”<sup>125</sup> The government did not explain, however, why these anonymous speakers were qualified to give such an opinion. The government also reported that these “representatives” thought that “it would be dangerous to expose young people in their formative years to the concept of homosexuality as there is a chance that young people’s sexual orientation will be unduly influenced.”<sup>126</sup>

The government’s use of the phrase “representatives of educational bodies” implies that these persons’ views are representative of the educational or academic sectors of Hong Kong. In fact, there was no special survey of teachers and educators on the subject, but only informal meetings between government officials and certain interested individuals and groups.<sup>127</sup> By not expressly endorsing these

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121. *Id.* at 13.

122. *Id.*

123. *See id.*

124. *See id.* at 16.

125. *Id.* at 8.

126. *Id.* at 9.

127. The Consultation Paper lists certain organizations and individuals who met with government officials, but the government was careful not to attribute the negative statements to any particular organization or individual. *See id.* app. I.



views, the government cleverly avoided being accused of prejudice. By repeating them without dispute or disclosure of the lack of supporting evidence, however, the government tacitly agreed with these views and gave them credibility. Thus, instead of "consulting" the public on the problem of sexuality discrimination, the government offered justifications for it.

This approach was far worse than the one taken in the 1993 *Green Paper* on sex discrimination. That consultative document strongly supported the government's position that sex discrimination was not a significant problem and should not be addressed with legislation.<sup>128</sup> Unlike the Consultation Paper, however, the government clearly stated in the 1993 *Green Paper* that it supported the principle of sexual equality, and it did not repeat or provide credibility to sexist statements of the principle's opponents.

At the conclusion of the consultation period, the government announced that the exercise results revealed the general public's opposition to legislation prohibiting sexuality discrimination.<sup>129</sup> Although the written statements submitted on sexuality discrimination were about evenly divided,<sup>130</sup> eighty-five percent of the responses on preprinted opinion forms opposed sexuality legislation.<sup>131</sup> Thus, the government declined to introduce a bill on the subject. By that time, however, the second private member's bill on sexuality, age, and family status discrimination had already been drafted. The government will certainly use the results of the consultation exercise to argue against the bill's enactment.

Clearly, the government now views the question of whether to adopt anti-discrimination legislation almost entirely as a political matter, deserving attention only under strong public pressure. By not acknowledging the importance of, and the dire need for, eliminating sexuality discrimination, the government completely rejected Wu's vision of law that would protect all victims of discrimination, including minority groups that lack political power.

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128. For a critique of the consultation paper on sex discrimination, see Carole J. Petersen, *The Green Paper on Equal Opportunities for Women and Men: An Exercise in Consultation or Evasion?*, 24 H.K. L.J. 8, 11-13 (1994).

129. See HOME AFFAIRS BRANCH, HONG KONG GOV'T, LEGISLATIVE COUNCIL BRIEF—EQUAL OPPORTUNITIES: FAMILY STATUS AND SEXUAL ORIENTATION (1996).

130. Eighty-one written submissions indicated support for legislation prohibiting sexuality discrimination, and 84 indicated opposition to such legislation. See *id.* at 2.

131. See *id.* at 1.

The negative tone of the government's paper may have had little effect on the results of the consultation exercise. In general, supporters of legislation prohibiting sexuality discrimination would be capable of identifying the bias reflected in the Consultation Paper. However, this official document, which carries a certain amount of credibility, will be sitting on Hong Kong library shelves for many years. It is unfortunate that the government did not present a more principled, or at least a more neutral or objective, position.

Despite these criticisms, the consultation exercise was a positive step for the Hong Kong gay and lesbian rights movement. The Consultation Paper disseminated some valuable information and served as a rallying point for activists seeking to persuade other gays and lesbians to become more visible and supportive of the movement. Petitions and copies of the Consultation Paper were distributed at gay bars and other meeting places where many signatures were obtained. In addition, the very fact that a formal consultation exercise was *conducted* on the subject should help to "mainstream" the issue of gay rights and give it some degree of credibility in the general community. A large number of social workers, women's groups, and human rights organizations submitted statements criticizing the government's survey and Consultation Paper and supporting legislation prohibiting sexuality discrimination. These submissions demonstrate that the gay rights movement is not completely isolated. Rather, it has allied itself with Hong Kong's broader equality and human rights movement. The written submissions also appear to have persuaded the Hong Kong government to be more supportive of gays and lesbians. In September 1996, the government issued a short brochure condemning sexuality discrimination and challenging many negative "myths" about homosexuality.<sup>132</sup> While falling short of recommending legislation to prohibit sexuality discrimination, this brochure constituted a significant and positive change in government policy toward the gay rights movement.

## VI. CONCLUSION: THE FUTURE OF THE GAY RIGHTS MOVEMENT AFTER 1997

The legal and political developments associated with 1997 have unquestionably improved the status of gays and lesbians in Hong

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132. See HOME AFFAIRS BRANCH, HONG KONG GOV'T, *EQUAL OPPORTUNITIES: SEXUAL ORIENTATION* (1996).

Kong. Decriminalization of homosexual conduct alone was a significant achievement, and the anti-discrimination movement has made more progress than anyone could have predicted in 1984.

The approach of July 1, 1997, however, threatens to halt the human rights movement and eradicate the rights achieved thus far. The PRC has already announced that it will weaken the Bill of Rights and reinstate the original versions of certain laws that were amended to conform with it. Fortunately, the PRC has not shown any inclination to reinstate laws against homosexual conduct. It is focusing more on laws that restrict civil liberties in general. The PRC should not have a reason to repeal any pre-1997 anti-discrimination legislation; however, if the pending bill prohibiting sexuality discrimination is not enacted in this legislative session, it is highly unlikely that such a bill will be enacted for several years after 1997.

Members of the equality movement, including gay and lesbian activists who tend to ally themselves with the broader human rights movement and pro-democracy legislators, may find the Chinese government closely monitoring and restricting their activities after 1997. While these concerns affect all members of the equality movement, gay and lesbian activists are more at risk. First, by choosing to join the movement, they have drawn attention to their sexuality and thereby risk discrimination that they may have avoided, which is not the case for most other victims of discrimination, such as women, who cannot conceal the basis for the discrimination. Moreover, the PRC is known to persecute homosexuals.<sup>133</sup> Thus, it may treat gay and lesbian activists more harshly than other members of the anti-discrimination movement. We can only hope that the achievements of the past five years will not be undone in 1997 and that the gay and lesbian rights movement will continue to gain strength and acceptance in the Hong Kong community.

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133. See BRET HINSCH, *PASSIONS OF THE CUT SLEEVE: THE MALE HOMOSEXUAL TRADITION IN CHINA* 162-66 (1990).